

ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

In re

Amendment of § 73.202(b) of the Rules,  
Table of Allotments, FM Broadcast Stations  
(Llano and Marble Falls, Texas)

MM Docket No. 95-49

RM-8858

8558

To: The Chief, Allocations Branch,  
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

## SECOND REPLY COMMENTS

Maxagrid Broadcasting Corporation ("Maxagrid"), the licensee of station KBAE(FM), Channel 284C3, Llano, Texas, hereby tenders its Reply Comments in response to the Further Notice of Proposed Rule Making, DA 96-1198, and the responsive Joint Comments and Counterproposal of Roy E. Henderson and Tichenor License Corporation in this proceeding. To avoid confusion with Maxagrid's earlier-filed Reply Comments in this proceeding, we style this filing Maxagrid's Second Reply Comments, and will refer to the earlier filing as Maxagrid's "First Reply Comments."

## I. BACKGROUND

### A. MAXAGRID'S PETITION

1. Maxagrid triggered this proceeding with a Petition that asked the FCC to relicense station KBAE to the unserved community of Marble Falls, Texas on Channel 285C3. Maxagrid proffered Channel 242A as able to render local service to Llano in full compliance with the FM technical rules. Accordingly, Maxagrid asked the Agency to allot Channel 242A to Llano.

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## **B. THE FIRST NPRM**

2. The FCC's Notice of Proposed Rule Making ("First NPRM"). DA 95-884, proposed to substitute Channel 285C3 at Marble Falls for Channel 284C3 at Llano, and solicited Comments and Counterproposals to the Marble Falls allotment. The First NPRM did not propose the allotment of Channel 242A to Llano, however. In Comments responsive to the First NPRM, Maxagrid restated its interest in relicensing KBAE to Marble Falls. Maxagrid also stated its intent to apply for Channel 242A at Llano.

## **C. MR. HENDERSON'S FIRST COUNTERPROPOSAL**

3. Roy E. Henderson, who holds an interest in station KLTO, Channel 285A, Rosenberg, Texas, filed a set of Comments and Counterproposal to the First NPRM ("First Counterproposal"). Mr. Henderson requested the relicensing of KLTO to Katy, Texas without a change in channel. However, for Channel 285A at Katy to meet the FCC's technical allocation criteria, cochannel station KBUK, LaGrange, Texas, had to physically move. Mr. Henderson suggested that the station change both its transmitter site and its community of license to Smithville, Texas, obviously because KBUK would not provide city-grade service to LaGrange from a site that would clear Channel 285A at Katy. Mr. Henderson said that he "would agree to reimburse [KBUK's] licensee for all reasonable expenses incurred from the relocation to Smithville, Texas...." But the First Counterproposal did not include a statement from the KBUK licensee consenting to the relocation of its station, a fatal defect under binding precedent. See, e.g., Mt. Morris, Illinois et al., 4 FCC Rcd 5485 (1989), recons. den., 5 FCC Rcd 1750 (1990).

**D. THE KIRKMAN GROUP'S COMMENTS**

4. The Kirkman Group, Inc. ("KGI"), the licensee of stations KHLB-AM and FM, Burnet, Texas, also filed Comments in response to the First NPRM. KGI opposed the relicensing of proposed reallocation because it would allegedly deprive Llano of its only licensed radio station and add "an unnecessary signal" to Marble Falls.

**E. MAXAGRID'S FIRST REPLY COMMENTS**

5. Maxagrid filed Reply Comments (its "First Reply Comments") directed to KGI's Comments. The First Reply Comments showed that KGI's Comments lacked merit. However, the First Reply Comments did not address the merits of the First Counterproposal because the FCC had not — and to this day has not — accepted the First Counterproposal for filing.<sup>1</sup>

**F. THE FURTHER NPRM AND THE RESULTING FILINGS**

6. Most recently, the FCC issued the Further NPRM proposing to allot Channel 242A to Llano. The Further NPRM solicited Comments and Counterproposals from third parties to the allotment of Channel 242A to Llano and a statement of continued interest in the substitute Llano channel from Maxagrid. Maxagrid supplied the statement as requested.

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<sup>1</sup>In light of *Mount Morris, Illinois, supra*, acceptance of the First Counterproposal would have been inappropriate. Also by way of background, earlier this year, Mr. Henderson filed pleadings related to communications between Maxagrid's counsel and the International Bureau staff concerning the status of the FCC request for the concurrence of the Mexican Administration to KBAE's licensing. Maxagrid filed a response addressing Mr. Henderson's concerns about the propriety of those discussions.

7. Mr. Henderson and Tichenor responded to the Further NPRM with their Comments and Counterproposal. Mr. Henderson seeks to relicense his Channel 285A Rosenberg station KLTO to Missouri City (adjacent to Houston), while upgrading it to Channel 285C3. But that facility would be short spaced to Tichenor's Channel 285A Galveston station, KLTP, so Tichenor seeks to relicense KLTP to the much smaller and rural West Texas community of Menard, with a channel change and upgrade (to Channel 242C2) in the process. We will now discuss the lack of merit to this "Second Counterproposal."

## **II. ARGUMENT: THE SECOND COUNTERPROPOSAL IS FATALLY DEFECTIVE.**

8. As we will now show, the Second Counterproposal is fatally defective on several grounds. The Commission's staff should promptly reject both it and the First Counterproposal, and issue a *Report and Order* granting Maxagrid's allotment requests.

### **A. THE SECOND COUNTERPROPOSAL IS UNTIMELY**

9. Channel 285C3 at Missouri City is short spaced to Mr. Henderson's First Counterproposal, Channel 285A at Katy. Hence, it is a Counterproposal to a Counterproposal.<sup>2</sup> While Mr. Henderson belatedly seeks to withdraw his First Counterproposal (by means of a September 23 Motion), that attempt is unavailing. Counterproposals to the allotment proposal set forth in the NPRM (Channel 285C3 at Marble Falls), to all counterproposals that might be filed in response to it, and to all alternative allotments that the Commission might make in lieu of

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<sup>2</sup>A counterproposal is an allotment proposal which is mutually exclusive with another proposed allotment. See, e.g., *Banks, Oregon*, 6 FCC Rcd 2462 (1991) at n.1.

it were due no later than June 22, 1995. See §§ 1.420 and 1.429(d) of the Rules; see also Appendix to the NPRM; Pinewood, South Carolina, 5 FCC Rcd 7609 (1990); Scranton and Surfside Beach, South Carolina, 4 FCC Rcd 2366 (1989).

10. The Marble Falls/Katy/Missouri City sequence is the classic A/B/C “daisy chain” that the Commission has considered time and time again. The FCC refuses to consider links in the chain forged after the original cut-off date or Counterproposal deadline in the proceeding, and with good reason, well expressed in Kittyhawk Broadcasting Corp., 7 F.C.C. 2d 153, 155 (1967), appeal dismissed sub nom. Cook, Inc. v. United States, 394 F.2d 84 (7th Cir. 1968):

Any other interpretation of the rule would result in its destruction because if C were accepted for filing, any applications filed subsequent thereto and in conflict with C would be entitled to consolidation in the ABC group. In theory, at least, the chain might never end, and any attempt to establish cut-off dates would be nugatory.

Therefore, the FCC has enforced its cut-off rules strictly. See, e.g., State of Oregon, Etc., 11 FCC Rcd 1843 (1995); Sacramento Community Radio, 8 FCC Rcd 4067 (1993); The Florida Institute of Technology, 4 FCC Rcd 1549 (1989), aff’d, 952 F.2d 549 (D.C. Cir. 1992); Nazarene Theological Seminary Radio Corporation (KSTR), 52 Rad. Reg. (P&F) 2d 559 (Broadcast Bur. 1982); LaGrange, Kentucky, 33 Rad. Reg. (P & F) 2d 1390 (1975). A prerequisite to waiver of the filing deadline is a showing that the latecomer has exercised reasonable diligence, and any tardiness is attributable to circumstances beyond its control. See, Bronco Broadcasting, Inc., 58 Rad. Reg. 2d (P&F) 909, 911 (1976). Mr. Henderson cannot make that showing, even if he had bothered to ask for a waiver of the original cut-off deadline. Because his Channel 285C3 Missouri City filing is untimely, and because Tichenor has inextricably wrapped its own Menard

proposal with that of Mr. Henderson for Missouri City, the staff must on delegated authority dismiss the joint Counterproposal in its entirety.<sup>3</sup>

**B. THE SECOND COUNTERPROPOSAL IS CONTINGENT**

11. While Channel 285C3 at Missouri City is mutually exclusive with Channel 285A at Katy and with Channel 285A at Galveston, Channel 285C3 at Missouri City is not mutually exclusive with Channel 242A at Llano or Channel 244C2 at Menard. Rather, it is contingent upon the relicensing of KLTP from Galveston to Menard.. The Commission “will not accept and process a Counterproposal contingent upon the outcome of a pending rule making proceeding. Stonewall, Mississippi et al., DA 96-366 (adopted March 15, 1996 and released March 26, 1996), citing, Broken Arrow, Oklahoma et al., 3 FCC Rcd 6307 (1988), recons. den., 4 FCC Rcd 6981 (1989). Hence, Mr. Henderson’s Missouri City proposal is doubly defective (untimely and contingent). And for this reason also, because Tichenor has irrevocably bound its own Menard proposal to Mr. Henderson’s defective one of for Missouri City (see n. 3, supra) , the staff must on delegated authority dismiss the joint Second Counterproposal in its entirety. Because of the Second Counterproposal’s fatal defects, no comparative analysis is necessary, and we therefore will not burden the record with demographic material that would support Maxagrid’s proposals but is moot under the circumstances.

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<sup>3</sup>Tichenor is only interested in moving KLTP from Galveston (*population more than 59,000*) to Menard (*population only 1,608*) “upon the adoption of this entire counterproposal.” Joint Comments and Counterproposal at 6.

**C. THE STAFF SHOULD IMPLEMENT MAXAGRID'S PROPOSALS FORTHWITH**

12. Local services at Llano and Marble Falls comports doubly with Priority Three of Revision of FM Assignment Policies and Procedures, 90 F.C.C. 2d 88 (1982) and hence serves the public interest. And as Maxagrid has shown in its prior filings, the revised allotment structure would result in a much more efficient use of the spectrum than is presently the case. There are no valid counterproposals pending in this proceeding. Hence, no comparative analysis is necessary. The staff should immediately terminate this proceeding by issuing a *Report and Order* granting the relief Maxagrid has requested.

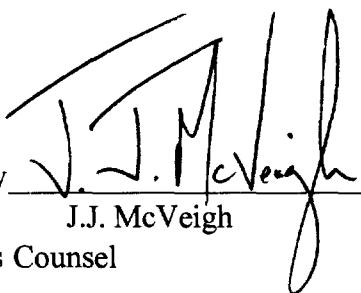
**III. CONCLUSIONS**

- *No other allotment proposals are entitled to comparative consideration in this proceeding.*
- *The Commission should relicense station KBAE(FM) to Marble Falls on Channel 285C3, while allotting Channel 242A to Llano.*
- *Doing so will permit:*
  - *the onset of a first local service to a deserving community (Marble Falls);*
  - *continued local service to Llano; and*
  - *much more efficient use of the radio spectrum.*

- *These consequences will clearly serve the public interest.*

Respectfully submitted,

**MAXAGRID BROADCASTING CORPORATION**

By   
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Date: October 8, 1996



## **CERTIFICATE OF SERVICE**

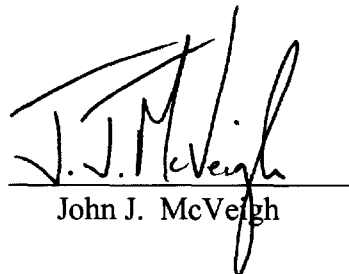
I hereby certify that I have this Eighth day of October, 1996, sent copies of the foregoing "Second Reply Comments" by first class United States Mail, postage prepaid, to:

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